

**United States Department of Labor
Employees' Compensation Appeals Board**

S.M., Appellant

and

**PEACE CORPS, VOLUNTEER SERVICES,
Washington, DC, Employer**

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**Docket No. 13-796
Issued: August 15, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 15, 2013 appellant filed a timely appeal from a January 4, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Because more than 180 days elapsed from the last merit decision dated July 18, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's case, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that she continues to have residuals and disability due to her cancer treatment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 5, 2001 appellant, then a 60-year-old Peace Corps volunteer, filed an occupational disease claim alleging invasive ductal carcinoma due to her living in Guatemala for 15 months. On August 8, 2002 OWCP accepted the claim for left breast invasive ductal carcinoma, malignant female breast neoplasm, malignant pelvis neoplasm and other specified idiopathic peripheral neuropathy. It placed appellant on the periodic rolls for temporary total disability.

On September 26, 2011 OWCP referred appellant for a second opinion evaluation with Dr. Misagh Karimi, a Board-certified internist and oncologist, who was requested to determine the extent of her disability, nature of her condition and appropriate treatment.

In an October 3, 2011 report, Dr. Karimi reviewed the medical and factual evidence and set forth findings on physical examination. He concluded that appellant's breast cancer and current symptoms were not work related. Dr. Karimi noted that there was no evidence of cancer on examination. He also reviewed an October 8, 2011 bone scan, which showed no discrete evidence of osseous metastasis and degenerative changes.

On November 15, 2011 OWCP issued a letter proposing to terminate appellant's compensation benefits based upon the opinion of Dr. Karimi.

In a letter dated November 25, 2011, appellant disagreed with the proposal to terminate her compensation. She argued that her weakness and pain were due to her chemotherapy and medicine for her accepted breast cancer. Appellant continued to have residuals and disability due to her accepted employment injury.

By decision dated January 9, 2012, OWCP finalized the termination of appellant's compensation benefits effective January 15, 2012.

On January 12, 2012 appellant requested an oral hearing before an OWCP hearing representative, which was held on April 19, 2012. Following the hearing, she submitted medical and factual evidence.

In a February 8, 2007 report, Dr. Kimberly L. Siegel, a treating Board-certified preventive medicine physician, provided information on appellant's current bone density in her hip, spine and femur. She noted that the result was reasonably good considering appellant's use of Arimidex.

An October 7, 2009 bone density report noted that the study was abnormal and showed osteoporosis. A January 3, 2012 report by Dr. Jennifer J. Choi, a treating Board-certified family practitioner, noted that appellant was seen for a compression fracture and given care instructions. She diagnosed low back pain, history of breast cancer, history of skin cancer, traumatic thoracic compression fracture, hyperlipidemia, hypothyroidism and osteoporosis.

In a March 15, 2012 report, Dr. Rita S. Mehta, a treating Board-certified internist with a subspecialty in oncology, reviewed the medical history and listed physical findings on examination. Under assessment, she noted that appellant had stage two breast cancer status post

chemotherapy and Arimidex, which appellant completed in March 2007. There was also fatigue and some degree of osteopenia. Dr. Mehta noted that Arimidex was associated with an increased risk of fracture and bone loss. The causes of osteopenia were listed as age, hypothyroidism and Arimidex.

In a May 7, 2012 letter, appellant noted that she sustained a T-12 vertebrae fracture as a result of a fall in December 2001, which she attributed to five years of Arimidex therapy, which weakens bones. She also alleged that she continued to have fatigue and pain due to the chemotherapy that she underwent for breast cancer.

By decision dated July 17, 2012 and finalized on July 18, 2012, an OWCP hearing representative affirmed the termination of appellant's compensation benefits. He found that she no longer had any disability or residuals from her accepted conditions based upon the opinion of Dr. Karimi. The hearing representative found that the medical evidence was insufficient to establish that appellant's disability was due to her cancer treatment or to create a conflict with the opinion of Dr. Karimi.

On October 26, 2012 appellant requested reconsideration and submitted evidence previously of record including, a February 8, 2007 report from Dr. Siegel and the October 7, 2009 bone density report. In an April 24, 2012 report, Dr. Mehta noted that appellant had a history of breast cancer requiring Arimidex treatment. She stated that bone loss and an increased risk for fracture was a side effect of Arimidex and that appellant sustained a bone fracture as a result of her cancer treatment.

By decision dated January 4, 2013, OWCP denied appellant's request for reconsideration without a merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) submit relevant and pertinent new evidence not previously considered by OWCP.³ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, OWCP

² *Id.* at §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

³ 20 C.F.R. § 10.606(b)(3). *See J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁴ *Id.* at § 10.607(a). *See S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

will deny the application for reconsideration without reopening the case for review on the merits.⁵

ANALYSIS

OWCP terminated appellant's entitlement to compensation benefits effective January 15, 2012 on the grounds that she no longer had any disability or residuals due to her accepted breast cancer. By decision dated July 18, 2012, an OWCP hearing representative affirmed the termination of her compensation benefits. On October 26, 2012 appellant requested reconsideration of the termination of her compensation benefits. The Board does not have jurisdiction over the July 18, 2012 hearing representative's decision affirming the January 9, 2012 termination decision. The issue presented is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3) to require OWCP to reopen the case for review of the merits of the claim.

In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument not previously considered by OWCP. Appellant contended that she continued to have residuals from her cancer treatment, specifically, a spinal fracture and bone loss due to the Arimidex therapy used in treating her cancer. The underlying issue in this case was whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective January 19, 2012 on the grounds that she no longer had any residuals or disability due to of the accepted condition of left breast cancer after that date. That is a medical issue which must be addressed by relevant medical evidence.⁶

The evidence submitted with appellant's reconsideration request consists of a February 8, 2007 report from Dr. Siegel, an October 7, 2009 bone density report and an April 24, 2012 report from Dr. Mehta. The reports of Dr. Siegel and the bone density report were previously submitted and considered by OWCP. The Board has held that evidence which is duplicative or repetitive of evidence existing in the record is not sufficient to warrant further merit review.⁷ These reports do not constitute relevant and pertinent new medical evidence and are insufficient to require OWCP to reopen appellant's case for further review of the merits.

The April 24, 2012 report from Dr. Mehta, while new to the record, repeated her opinion, which noted a side effect of Arimidex was an increased risk for fracture and bone loss. The submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁸ The Board finds that Dr. Mehta's April 24, 2012 report

⁵ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁶ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁷ *L.T.*, Docket No. 09-1798 (issued August 5, 2010); *L.H.*, 59 ECAB 253 (2007); *Jennifer A. Guillary*, 57 ECAB 485 (2005).

⁸ See *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007); *Candace A. Karkoff*, 56 ECAB 622 (2005).

is duplicative and cumulative of that dated March 15, 2012 and is insufficient to warrant further merit review of appellant's claim.

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(3) and, therefore, properly denied her October 26, 2012 request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's request to reopen her case for further review of the merits under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 4, 2013 is affirmed.

Issued: August 15, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board